STATE OF MICHIGAN

COURT OF APPEALS

ROBERT S. CAMERON,

Plaintiff-Appellant,

v

J & J HOSPITALITY, INC., d/b/a BIG BOY RESTAURANT, and RED ROOF INNS, INC.,

Defendants-Appellees.

UNPUBLISHED
December 20, 2007

No. 275380
LC No. 06-000241-NO

Before: Donofrio, P.J., and Sawyer and Cavanagh, JJ.

PER CURIAM.

In this premises liability action arising from a slip and fall, plaintiff, Robert S. Cameron, appeals as of right from the trial court order granting summary disposition in favor of defendants, J & J Hospitality, Inc. (Big Boy) and Red Roof Inns, Inc. (Red Roof). Because the water on the tile foyer constituted an objectively open and obvious danger as a matter of law, and no special aspects were present, we affirm.

On January 2, 2005, plaintiff was injured when he slipped and fell on wet tile in the common foyer between defendant businesses. There was a wet floor sign in the foyer about six feet or more from the entrance door indicating that the floor was wet. Plaintiff stated that he would have been walking toward the sign when he first entered, but he did not see the sign or the floor before falling because he was not looking down when he entered the foyer. Instead, plaintiff stated that he immediately looked up at the ceiling as he entered because there was a leak in the ceiling and the sound of the running water distracted him. The leak was not directly over the area where plaintiff fell, but was in the foyer about ten to fifteen feet away. Plaintiff testified that when he exited the restaurant after about 30 to 45 minutes, he saw a five-gallon, overflowing bucket below the ceiling leak located behind a half-wall.

Big Boy brought a motion for summary disposition under MCR 2.116(C)(10), arguing that plaintiff presented no evidence that his fall was caused by the wet floor. Red Roof also brought a MCR 2.116(C)(10) motion, arguing that the condition was open and obvious, that no special aspects were present, and that there was no distracted-customer exception to the open and obvious doctrine. The trial court granted summary disposition in defendants' favor, finding that there was "no specific proof that the plaintiff did in fact slip on water." The trial court also concluded that the danger presented was open and obvious and that the dripping water served as a warning to plaintiff. The trial court held alternatively that Big Boy owed plaintiff no duty

because it was not responsible for maintenance of the common foyer. Plaintiff now challenges the trial court's grant of summary disposition.

We review de novo a trial court's grant of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The pleadings, affidavits, depositions, admissions, and other admissible documentary evidence submitted by the parties must be considered in the light most favorable to the nonmoving party. MCR 2.116(G)(5); *Kennedy v Great Atlantic & Pacific Tea Co*, 274 Mich App 710, 712; 737 NW2d 179 (2007). "Summary disposition is proper under MCR 2.116(C)(10) if the affidavits and other documentary evidence show that there is no genuine issue concerning any material fact and that the moving party is entitled to judgment as a matter of law." *Id*.

Because plaintiff was an invitee, defendants had a duty to maintain the premises in a reasonably safe condition and to warn him of any unreasonable risk of harm that defendants knew about or should have known about, and which a reasonable person might not discover upon casual inspection. *Novotney v Burger King Corp* (*On Remand*), 198 Mich App 470, 474-475; 499 NW2d 379 (1993). However, a premises possessor is generally not required to protect an invitee from open and obvious dangers unless special aspects elevate the otherwise open and obvious danger to an unreasonably dangerous one. *Lugo v Ameritech Corp*, 464 Mich 512, 517-519; 629 NW2d 384 (2001). Special aspects exist when the danger, although open and obvious, is effectively unavoidable or imposes a uniquely high likelihood of harm or severity of harm. *Id*. at 518-519. "It is the aggregate of factors that the trial court must analyze to determine if there are special aspects that give rise to a uniquely high likelihood of harm or severity of harm if the risk is not avoided." *O'Donnell v Garasic*, 259 Mich App 569, 578; 676 NW2d 213 (2003).

Plaintiff argues that the sight and sound of water dripping from the ceiling either rendered the danger not open and obvious due to the distraction caused, or constituted special aspects that elevated the danger presented. In determining whether a condition is open and obvious, the focus is on the condition itself and whether an average person would have noticed it on casual inspection, not whether the plaintiff himself was looking at it. *Lugo, supra* at 524; *Bertrand v Alan Ford, Inc*, 449 Mich 606, 611; 537 NW2d 185 (1995); *Hughes v PMG Bldg, Inc*, 227 Mich App 1, 11; 574 NW2d 691 (1997). When considering whether a danger is open and obvious, we address whether the circumstances existing before the accident would make a dangerous condition obvious to a reasonable person. See *Joyce v Rubin***,** 249 Mich App 231, 238-240; 642 NW2d 360 (2002).

According to plaintiff's contentions, and with the evidence viewed in the light most favorable to plaintiff, he slipped on wet tile because as he entered the foyer he immediately looked up at the ceiling since the sight and sound of a leak in the ceiling distracted him. Our review of the record reveals that the danger presented by the water on the tile floor in the foyer would have been readily apparent to a casual observer. The record illustrates that the incident occurred in early January in Michigan, plaintiff testified that the sidewalk leading to the foyer was wet with either slush or melting snow, and a wet floor sign was present in the foyer only six feet away from where plaintiff slipped in the entryway. Plainly, plaintiff would have seen the wet floor itself, or the wet floor sign had he made a casual inspection by looking at the floor in the entryway. See *Lugo, supra* at 523-524. Further, a reasonable person hearing and seeing water drip from a ceiling would be alerted that a slippery condition might be present on the tile, would anticipate the danger presented by the leak, and would stop or look down to ensure that

the path to be traversed was free of water. See *Joyce, supra* at 238-243. We conclude that the general surrounding conditions would have alerted a reasonable person to the possibility that defendants' foyer was potentially treacherous. *Lugo, supra* at 524.

Next, we address plaintiff's assertion that the sight and sound of water dripping from the ceiling caused plaintiff to be distracted and thus constituted a special aspect. "[S]pecial aspects are not defined with regard to whether a premises possessor should expect that an invitee will not discover the danger or will not protect against it, but rather by whether an otherwise open and obvious danger is effectively unavoidable or imposes an unreasonably high risk of severe harm to an invitee." *Mann v Shusteric Enterprises, Inc*, 470 Mich 320, 331-332; 683 NW2d 573 (2004), citing *Lugo, supra* at 518. The critical inquiry is whether there was something unusual about the danger itself, which because of its "character, location, or surrounding conditions . . . gives rise to an unreasonable risk of harm." *O'Donnell, supra*.

We are not persuaded that the that the sight and sound of water dripping from the ceiling ten to fifteen feet away from the entryway substantially increased the likelihood that severe harm would occur to patrons who entered defendants' foyer. Adopting plaintiff's argument would require us, contrary to *Lugo, supra* at 518 n 2, to lose our focus on the state of the premises and focus instead on the effect the condition had on this specific plaintiff. The record reflects that plaintiff could have avoided injury had he looked at the floor tile or observed the wet floor sign and more carefully traversed the entryway area instead of focusing on the ceiling leak. Indeed, a ceiling leak would put a reasonable person on notice that water may have accumulated beneath it or around it, thus making a slippery condition even more obvious than it otherwise might have been to a casual observer. Therefore, with regard to the distraction plaintiff experienced because of the ceiling leak, he has failed to demonstrate that it either posed an unavoidable danger or a danger that carried with it an unreasonable risk of severe harm.

Finally, defendant also contends that special aspects existed because the standing water was in the sole entrance to the business for invitees. This Court held in *Robertson v Blue Water Oil Co*, 268 Mich App 588, 593-595; 708 NW2d 749 (2005) that an open and obvious danger was effectively unavoidable when an invitee had to encounter it to enter a business. However, here, plaintiff testified that the water on the tile where he fell was "spotty with puddles." He stated there "wasn't a continuous sheet of water" and that there were dry parts of the exposed tile. There was also a mat on a portion of the foyer floor. Plaintiff also presents no evidence suggesting that he could not have safely negotiated the tile had he looked down. And we have found nothing in the record suggesting that plaintiff could not have avoided the wet areas on the tile while walking into the restaurant had he noticed the condition. Moreover, plaintiff claims to have slipped when he stepped off of a mat. Thus, arguably, the mat provided a safe haven within the foyer where plaintiff could have paused in safety to inspect his surroundings before continuing into the restaurant. Hence, a jury could only speculate that plaintiff could not have avoided the danger had he made a casual inspection, and speculation and conjecture are insufficient to establish a genuine issue of material fact. *Detroit v Gen Motors Corp*, 233 Mich App 132, 139; 592 NW2d 732 (1998).

In sum, we conclude that the trial court did not err in finding that the danger was open and obvious as a matter of law and no special aspects were present. Because defendants owed

plaintiff no duty under the circumstances, we need not address plaintiff's assertion that the trial court erred in dismissing the claims against Big Boy because it was not responsible for foyer maintenance.

Affirmed.

/s/ Pat M. Donofrio
/s/ David H. Sawyer
/s/ Mark J. Cavanagh